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No. 04-1618

In The Supreme Court Of The United States

NORTHERN INSURANCE COMPANY OF NEW YORK,
PETITIONER,

v.

CHATHAM COUNTY, GEORGIA,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

Whether an entity that does not qualify as an "arm of the State" for Eleventh Amendment purposes can nonetheless assert sovereign immunity as a defense to an admiralty suit.

TABLE OF CONTENTS

Page

Interest of Southeastern Pennsylvania Transportation Authority 1
Summary of Argument 2
Argument 4
I. State Sovereign Immunity Is Embedded In Our Constitutional Structure And Is Not Limited To The Eleventh Amendment. 4
II. Where An Agency Or Instrumentality Of The State Is Exercising State Power And Entitled To Sovereign Immunity Under State Law, The Doctrine Of Residual Sovereign Immunity Protects That Entity From Liability. 9
III. Recognizing Residual Sovereign Immunity Where A State-Created Entity is Exercising State Power And Is Entitled To Immunity Under State Law Is Consistent With This Court's Jurisprudence In Other Areas While The Petitioner's Approach Ignores History And Undermines The Fundamental Purposes Of Sovereignty. 16
Conclusion 18

TABLE OF AUTHORITIES

Cases: Page

Alden v. Maine, 527 U.S. 706 (1999) ..... passim

Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991) 6

Bolden v. SEPTA, 953 F.2d 807 (3d Cir. 1991) 10

Ex parte New York, 256 U.S. 490 (1921) 6

Federal Maritime Commission v. South Carolina State Ports Authority, 535 U.S. 743 (2002) ..... passim

Feingold v. SEPTA, 517 A.2d 1270 (Pa. 1986) 10

Hans v. Louisiana, 134 U.S. 1 (1890) 6

Helvering v. Gerhardt, 304 U.S. 405 (1938) 12

In re Ayers, 123 U.S. 443 (1887) 7

Jinks v. Richland County, 538 U.S. 456 (2003) 18

Jones v. SEPTA, 772 A.2d 435 (Pa. 2001) 10

Lake Country Estates v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979) 16, 18

Cases - Continued: Page

Lincoln County v. Luning, 133 U.S. 529 (1890) 17

Metropolitan Railroad Co. v. District of Columbia, 132 U.S. 1 (1889) 17

Mt. Healthy City Sch. Dist. Bd. of Ed. v. Doyle, 429 U.S. 274 (1979) 16, 18

New Ice State Co. v. Liebmann, 285 U.S. 262 (1932) 8

Parker v. Brown, 317 U.S. 341 (1943) 16

Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299 (1990) 10

Principality of Monaco v. Mississippi, 292 U.S. 313 (1934) 6

Printz v. United States, 521 U.S. 898 (1997) 12

Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993) 7

Sailors v. Bd. of Ed. of Kent County, 387 U.S. 105 (1967) 9

Smith v. Reeves, 178 U.S. 436 (1900) 6

Tulewicz v. SEPTA, 606 A.2d 427 (Pa. 1992) 10

Cases - Continued: Page

Welch v. Texas Dept. of Highways and Public Transp., 483 U.S. 468 (1987) 10, 15

Wisconsin Public Intervenor v. Mortier, 501 U.S. 597 (1991) 8, 9

Constitutions and Statutes:

U.S. Const. Amend. XI ..... passim
45 U.S.C. § 51 15
42 Pa.C.S. § 8501 9
74 Pa.C.S. § 1711(a) 9
74 Pa.C.S. § 1711(C)(3) 9
74 Pa.C.S. §§ 1701-1785 9
77 Pa.C.S. § 1 15

Miscellaneous:

Alexander Hamilton, The Federalist No. 81 (C. Rossiter ed. 1961) 6

1 The Debates in the Several State Conventions on the Adoption of the Federal Constitution (Jonathan Elliott ed., 2d ed. 1836) 14

2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution (Jonathan Elliott ed., 2d ed. 1836) 13

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INTEREST OF SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY [1]

The Southeastern Pennsylvania Transportation Authority ("SEPTA") is an agency and instrumentality of the Commonwealth of Pennsylvania, exercising the public powers of the Commonwealth to operate a mass-transit system within Philadelphia and its four contiguous counties. As an agency of the Commonwealth exercising public powers, the Pennsylvania General Assembly has granted

[1] Counsel of record for all parties have consented to the filing of this brief and the consents have been filed with the Clerk of the Court. No counsel for any party authored this brief, in whole or in part, and no person or entity other than SEPTA has made a monetary contribution to its preparation and submission.

SEPTA sovereign immunity. Indeed, SEPTA's entitlement to sovereign immunity has repeatedly been recognized by the state courts in Pennsylvania. Nevertheless, the Third Circuit, applying federal common law, has concluded that SEPTA is not an arm of the State for Eleventh Amendment immunity purposes. Assuming that the Third Circuit's decision is correct, unless SEPTA is entitled to immunity under the doctrine of residual sovereign immunity, SEPTA will be exposed to liability against the will of the sovereign.

The impact of such a result is not theoretical. If SEPTA is not entitled to immunity, SEPTA will continue to be exposed to liability under the Federal Employers' Liability Act ("FELA"). That exposure is largely passed through to the Commonwealth. SEPTA operates at a substantial operating deficit that is exacerbated by its exposure to FELA liability. As a consequence, in addition to direct funding from the Commonwealth for SEPTA's operating and capital budgets, SEPTA has received a series of recent financial bail outs from the state.

Stated plainly, unless SEPTA is entitled to invoke the doctrine of residual sovereign immunity, the fundamental purposes of state sovereignty will be undermined. First, the Commonwealth of Pennsylvania's dignity as a sovereign will be eroded if its agency can be summoned as a defendant against the State's will to answer the complaints of private persons. Second, as a practical matter, and as the last three budget years have demonstrated, the state is responsible for SEPTA's operating shortfalls. As a result, the Commonwealth's treasury is not shielded and Pennsylvania's ability to govern in accordance with the will of its citizens is undermined.

SUMMARY OF ARGUMENT

This Court has consistently recognized that dual sovereignty is a defining feature of our constitutional framework. A fundamental principle of sovereignty is the

flexibility of the sovereign to govern as it sees fit. Captured within that principle is the State's ability to create state agencies and authorities, delegate to those agencies and authorities an aspect of state power and cloak those entities with the State's sovereign immunity. Existing Eleventh Amendment jurisprudence, however, does not always recognize that such entities are arms of the State entitled to immunity. Consequently, the doctrine of residual sovereign immunity should be applied to preserve this critical component of federalism.

As an initial matter, the Eleventh Amendment does not define the scope of sovereign immunity. Rather, the Amendment is merely one particular exemplification of that immunity and the States retain a residual and inviolable sovereign immunity, which is embedded in our constitutional structure. The Circuit Court recognized that the principles of sovereignty are respected by according a county with immunity where that county is exercising delegated state power and the sovereign itself intends to extend its immunity to the county in performing that function.

The result below is also consistent with this Court's approach to deciding cases involving sovereign immunity. The recent jurisprudence of this Court establishes a methodology for resolving these issues. Critical to that inquiry is the recognition that the States entered into the Union with their sovereignty intact unless that sovereignty was clearly yielded in ratifying the Constitution. Here, the issue before the Court goes to the fundamental nature of sovereignty itself: the ability of the sovereign to govern as it sees fit. Stated differently, did the States retain the ability to create political subdivisions or agencies, delegate to those entities state power and cloak those entities with the States' sovereign immunity in performing those functions? It is simply unimaginable that the States surrendered this critical

component of their sovereignty when they ratified the Constitution.

Further, recognizing the doctrine of residual sovereign immunity where the State delegates an aspect of its power and cloaks its agency with sovereign immunity is consistent with the two fundamental purposes of sovereign immunity. First, it protects the dignity of the sovereign by not allowing its agency to be hauled into Court against its will. Second, it preserves the state treasury to the extent that the state may be ultimately responsible for the liability.

ARGUMENT

I. STATE SOVEREIGN IMMUNITY IS EMBEDDED IN OUR CONSTITUTIONAL STRUCTURE AND IS NOT LIMITED TO THE ELEVENTH AMENDMENT.

Because the concept of federalism is embedded in our constitutional structure, this Court has held that the Eleventh Amendment does not define the metes and bounds of a State's immunity from suit. As a consequence, the conclusion that a state-created entity does not qualify as an arm of the State under the Eleventh Amendment does not end the analysis. Rather, when faced with an issue of state sovereignty, a court should also examine the historical record mindful of the fundamental purposes of sovereignty to determine if the doctrine of residual sovereign immunity should be applied. A review of that historical record combined with an application of the fundamental purposes of state sovereignty as recognized by this Court yields only one logical result -- a state-created entity exercising state power and cloaked with the State's sovereignty under state law is entitled to sovereign immunity in the exercise of that power.

"[D]ual sovereignty is a defining feature of our Nation's blueprint." *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743, 751 (2002). Indeed, the States' "sovereign immunity [...] is embedded in

our constitutional structure and retained by the States when they joined the Union [....]" *Id.* at 754. "[F]ederalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation." *Alden v. Maine*, 527 U.S. 706, 748 (1999). As a consequence, states retain "a residuary and inviolable sovereignty. They are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty." *Id.* at 715 (internal quotation and citation omitted).

An integral component of the States' "residuary and inviolable sovereignty is their immunity from private suits." *Federal Maritime Commission*, 535 U.S. at 751 (citations and quotations omitted). "The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity. [....] [T]he doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified." *Alden*, 527 U.S. at 715-16 (citations omitted). Indeed, "the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today." *Id.* at 713.

As Alexander Hamilton observed, unless there is a surrender of that immunity, it remains with the States:

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State of the Union. Unless, therefore, there is a surrender of this

> immunity in the plan of the convention, it will remain with the States ....

Alexander Hamilton, The Federalist No. 81, p. 487-488 (C. Rossiter ed. 1961) (emphasis in original) (quoted in *Federal Maritime Commission*, 535 U.S. at 752).

A State's immunity from suit is reflected, in part, in the Eleventh Amendment and this Court's arm of the State cases. It has long been recognized, however, that "the Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity." *Federal Maritime Commission*, 535 U.S. at 753. In fact, the Supreme Court "has repeatedly held that the sovereign immunity enjoyed by the States extends beyond the literal text of the Eleventh Amendment." *Id.* at 754. Thus, in *Hans v. Louisiana*, 134 U.S. 1 (1890), the Court held that sovereign immunity includes protection of a State from federal court suits brought by its own citizens, as well as by citizens of other States. *See also Principality of Monaco v. Mississippi*, 292 U.S. 313, 323 (1934) (applying state sovereign immunity to suits by foreign nations); *Alden*, 527 U.S. at 757 (1999) (holding that sovereign immunity shields States from private suits in state courts pursuant to federal causes of action); *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991) (applying state sovereign immunity to suits by Indian tribes); *Ex parte New York*, 256 U.S. 490 (1921) (applying state sovereign immunity to admiralty proceedings); *Smith v. Reeves*, 178 U.S. 436 (1900) (applying state sovereign immunity to suits by federal corporations); *Federal Maritime Commission*, *supra* (applying state sovereign immunity to administrative proceedings).

In addition to its historical justification, this Court has recognized that "[t]he preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities." *Federal*

Maritime Commission, 535 U.S. at 760 ("The founding generation thought it 'neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons.'") (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)). "The principle of sovereign immunity preserved by constitutional design 'thus accords the States the respect owed them as members of the federation' . . . Private suits against nonconsenting states . . . present the 'indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties, regardless of the forum." *Alden*, 527 U.S. at 748-49 (quoting *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)).

Sovereign immunity also serves the important functions of shielding state treasuries and preserving the States' ability to govern in accordance with the will of their citizens. *Federal Maritime Commission*, 535 U.S. at 765; *Alden*, 527 U.S. at 750-51. Thus, underlying "constitutional form [....] are considerations of great substance." *Alden*, 527 U.S. at 750. "It is indisputable that, at the time of the founding, many of the States could have been forced into insolvency but for their immunity from private suits [...]." *Id.* In an observation prescient of SEPTA's current circumstances, the *Alden* Court stated:

> Even today, an unlimited congressional power to authorize suits in state court to levy upon the treasuries of the States for compensatory damages, attorney's fees, and even punitive damages could create staggering burdens [....][which could] pose a severe and notorious danger to the States and their resources.

Id. Thus, failure to properly recognize sovereign immunity could "place unwarranted strain on the States' ability to govern in accordance with the will of their citizens." *Id.* at 750-51. *Alden* further explained the practical importance of federalism on our modern representational system of government:

> Today, as at the time of the founding, the allocation of scarce resources among competing needs and interests lies at the heart of the political process. While the judgment creditor of the State may have a legitimate claim for compensation, other important needs and worthwhile ends compete for access to the public fisc [....] If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen.

Id. at 751.

This Court's prior precedent undeniably teaches that state sovereign immunity is a founding principle of our Constitutional structure. That structure wisely preserved the States' ability to govern as they see fit, allowing the States to serve as "laborator[ies]" when they strive "to remould, through experimentation, . . . economic practices and institutions to meet changing social and economic needs." *New Ice State Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). A critical component of that structure is the State's authority to delegate its power to instrumentalities and agencies in accordance with the will of its citizens. *See Wisconsin Public Intervenor v. Mortier*, 501

U.S. 597, 607-08 (1991) (citing *Sailors v. Bd. of Ed. of Kent County*, 387 U.S. 105, 108 (1967)). Today, the Court must determine if the principles of federalism also permit the States to cloak their instrumentalities and agencies with their own sovereign immunity when exercising that state power. As explained below, an application of the methodology and reasoning of this Court's prior precedent demonstrates that it does.

II. WHERE AN AGENCY OR INSTRUMENTALITY OF THE STATE IS EXERCISING STATE POWER AND ENTITLED TO SOVEREIGN IMMUNITY UNDER STATE LAW, THE DOCTRINE OF RESIDUAL SOVEREIGN IMMUNITY PROTECTS THAT ENTITY FROM LIABILITY.

Before addressing the core issue, it is important to understand SEPTA's legal status. SEPTA was created by Pennsylvania statute to operate a mass-transit system within Philadelphia and its four contiguous counties. *See* 74 Pa.C.S. §§ 1701-1785. The Commonwealth of Pennsylvania has determined that SEPTA "shall in no way be deemed to be an instrumentality of any city or county or other municipality or engaged in the performance of a municipal function, but shall exercise the public powers of the Commonwealth as an agency and instrumentality thereof." 74 Pa.C.S. § 1711(a). The Commonwealth also mandates that SEPTA shall "continue to enjoy sovereign and official immunity [...] and shall remain immune from suit except as provided by and subject to the provisions of 42 Pa.C.S. § 8501 (relating to definitions) through 8528 (relating to limitations on damages)." 74 Pa.C.S. § 1711(C)(3). Moreover, SEPTA's

entitlement to sovereign immunity has been repeatedly affirmed by the Pennsylvania state courts.[2]

Despite SEPTA's status as an instrumentality and agency of the State, exercising authority delegated to it by the State, and entitled to sovereign immunity under state law, the Third Circuit in *Bolden v. SEPTA*, 953 F.2d 807 (3d Cir. 1991), applying federal common law, concluded that SEPTA is not an arm of the State entitled to Eleventh Amendment immunity.[3] Thus, unless SEPTA can invoke the doctrine of residuary sovereign immunity, it will continue to be hauled into Court against the will of the sovereign and subject to liability.

Fortunately, this Court has developed a methodology for resolving issues regarding a State's residuary and immutable sovereignty. In *Federal Maritime Commission*, this Court set forth the proper framework for analyzing the boundaries of sovereign immunity. The question before the Court in *Federal Maritime Commission* was whether the

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[2] *See, e.g., Jones v. SEPTA*, 772 A.2d 435 (Pa. 2001); *Tulewicz v. SEPTA*, 606 A.2d 427 (Pa. 1992); *Feingold v. SEPTA*, 517 A.2d 1270 (Pa. 1986).

[3] As a consequence, SEPTA's position is similar to that of Chatham County. Just as the Eleventh Amendment prohibits admiralty suits against the state unless the state expressly waives its immunity and consents to suit, *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 473 (1987), the Eleventh Amendment also prohibits Federal Employers' Liability Act (FELA) suits against a non-consenting state. *See Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305 (1990). Just as the State of Georgia has granted Chatham County sovereign immunity status under state law where exercising certain state powers, so has the Commonwealth of Pennsylvania granted sovereign immunity status to SEPTA. While SEPTA and Chatham County believe that a proper application of the Eleventh Amendment would recognize that they are entitled to immunity where exercising delegated state power and the sovereign intends the immunity to imply, the current, uncertain status of the Circuits' application of the arm of the State doctrine continues to expose them to liability.

States' sovereign immunity extends not only to federal judicial proceedings but also to proceedings before an administrative tribunal. The Court framed the question this way: "[Does] the sovereign immunity embedded in our constitutional structure and retained by the States when they joined the Union extend [] to FMC adjudicative proceedings[?]" 535 U.S. at 754.

Finding "a relatively barren historical record" from which to ascertain the intent of the Framers on this question, this Court observed that "[t]he Framers, who envisioned a limited Federal Government, could not have anticipated the vast growth of the administrative state." 535 U.S. at 755 (citation and quotation omitted). Recognizing both the "interest in protecting States' dignity and the strong similarities between FMC proceedings and civil litigation," the *FMC* Court held that state sovereign immunity barred the Federal Maritime Commission from adjudicating private party complaints against a non-consenting State. The Court explained:

> Simply put, if the Framers thought it an impermissible affront to a State's dignity to be required to answer the complaints of private parties in federal courts, we cannot imagine that they would have found it acceptable to compel a State to do exactly the same thing before the administrative tribunal of an agency, such as the FMC.

535 U.S. at 760 (citation omitted).

Following the approach set forth in *Federal Maritime Commission*, the Court should ask whether the sovereign immunity embedded in our Constitutional structure and retained by the States when they joined the Union allows a State to create an agency or instrumentality, delegate state power to that entity and cloak that entity with sovereign immunity when exercising that power. Adopting

the reasoning of the Court in *Federal Maritime Commission*, it is hard to imagine that the Framers could have intended that the States could retain the power to create agencies and instrumentalities and bestow them with state power, without also retaining the power to cloak those entities with an essential attribute of sovereignty – sovereign immunity.

While the Framers could not have predicted the vast complexities of today's administrative state, they nonetheless intended that the States retain the flexibility to create instrumentalities pursuant to their reserved sovereignty. Indeed, this Court has observed that the States' residuary and inviolable sovereignty is reflected throughout the Constitution's text, which further "presupposes the continued existence of the States and [...] those means and instrumentalities which are the creation of their sovereign and reserved rights." *Printz v. United States*, 521 U.S. 898, 919 (1997) (quoting *Helvering v. Gerhardt*, 304 U.S. 405, 414-415 (1938)).

Historical evidence further suggests that the Framers intended that where the State creates "objects" or "functionaries" to perform delegated state powers, those entities may retain state sovereignty. On the question of drawing a proper line between the federal and state governments, Constitutional Convention delegate James Wilson from the Commonwealth of Pennsylvania stated:

> It was easy to discover a proper and satisfactory principle on that subject. ***Whatever object of government is confined, in its operation and effects, within the bounds of a particular state, should be considered as belonging to the government of that state***; whatever object of government extends, in its operation or effects, beyond the bounds of a particular state, should be

> considered as belonging to the government of the United States.

2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution at 424 (Jonathan Elliott ed., 2d ed. 1836) (emphasis added). In short, the Framers clearly understood that the States would be able to organize their affairs as they saw fit -- including creating agencies and instrumentalities, delegating to those entities state power and cloaking those entities with sovereign immunity.

This understanding was reinforced early on in our nation's history. Justice Joseph Story, making remarks in 1833 "respecting the political rights and sovereignty of the several colonies, and of the union which was thus spontaneously formed by the people of the United Colonies, by the declaration of independence" in his *Commentaries on the Constitution* observed:

> The sovereignty of a nation or state, considered with reference to its association, as a body politic, may be absolute and uncontrollable in all respects, except the limitations which it chooses to impose upon itself. But the sovereignty of the government, organized within the state, may be of a very limited nature. It may extend to a few, or to many objects. It may be unlimited, as to some; it may be restrained, as to others. To the extent of the power given, the government may be sovereign, and its acts may be deemed the sovereign acts of the state. Nay, ***the state, by which we mean the people composing the state, may divide its sovereign powers among various functionaries, and each, in the limited sense, would be sovereign in respect to the powers confided to each***, and dependent in all other cases. Strictly speaking,

> in our republican forms of government, the absolute sovereignty of the nation is in the people of the nation; and the residuary sovereignty of each state, not granted to any of its public functionaries, is in the people of the state.

1 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 64-65 (Jonathan Elliott ed., 2d ed. 1836) (emphasis added). Thus, the State may divide its power among its various functionaries and convey sovereignty to those functionaries "in respect to the powers confided to each."

As in *Federal Maritime Commission*, "we cannot imagine" that the Framers intended that the States retained the freedom and flexibility to delegate their sovereign power among various functionaries without also retaining the authority to convey to those entities the benefits of sovereign immunity. Indeed, the concept that the States could not bestow state-created entities, exercising state power, with sovereign immunity is at odds with the fundamental well-being of those agencies and instrumentalities. *Alden* teaches that sovereign immunity is essential to the State's ability to govern in accordance with the will of the people so as to "allocate[e] [...] scarce state resources among competing needs and interests." *Alden v. Maine*, 527 U.S. at 750-51. Without the protection of sovereign immunity, States could face the "staggering burdens" upon the treasury of unlimited liability in suits for compensatory damages, attorney's fees and punitive damages. *Id.* Such protection is equally essential to the integrity of the agencies and instrumentalities of the State exercising state power.

The financial ramifications for an entity like SEPTA only underscore this point. SEPTA is a public transit authority and agency of the Commonwealth of Pennsylvania,

exercising state power and entitled to sovereign immunity under state law. SEPTA also faces a projected annual deficit for fiscal year 2007 of $ 72 million.[4] It is the will of the sovereign Commonwealth of Pennsylvania that SEPTA have sovereign immunity from suit, including immunity from actions under FELA.[5] It is further the will of the sovereign that injured SEPTA workers have a more limited remedy under state workers compensation laws.[6] These choices by the Commonwealth of Pennsylvania represent a fair "allocation of scarce resources among the competing needs and interests [of the citizens] which lies at the heart of the political process." *Alden*, 527 U.S. at 750-751. Failure to recognize Pennsylvania's will to govern in this way would have a substantial financial impact on the State and be no less than "an affront to the State's dignity." *Federal Maritime Commission*, 535 U.S. at 760.

In sum, the flexibility of the State to create agencies and instrumentalities to exercise delegated state power with the cloak of sovereign immunity is fundamental to the State's sovereignty. Because Eleventh Amendment

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[4] Over the past ten years, SEPTA has faced significant financial challenges, resulting in two work force reductions and several hiring freezes. As a result of SEPTA's financial difficulties, the amount of funding it receives from the Commonwealth has increased considerably, so that it now receives over half of its funding from the Commonwealth. SEPTA has received millions of dollars in financial "bail outs" from the Commonwealth.

[5] 45 U.S.C. § 51 *et seq.* FELA permits unlimited recoveries for pain and suffering and allows the jury to determine the nature and extent of future wage losses that will be compensated. *See Welch v. Texas Dept. of Highways*, 483 U.S. 468, 476-478 (1987).

[6] 77 Pa.C.S. § 1 *et seq.* The Pennsylvania workers' compensation law provides schedules and formulas allowing for recovery for defined types of economic losses.

jurisprudence does not always recognize this, it is essential that the doctrine of residuary and inviolate sovereign immunity be applied to preserve this fundamental element of federalism embedded in our Constitutional structure.

III. RECOGNIZING RESIDUAL SOVEREIGN IMMUNITY WHERE A STATE-CREATED ENTITY IS EXERCISING STATE POWER AND IS ENTITLED TO IMMUNITY UNDER STATE LAW IS CONSISTENT WITH THIS COURT'S JURISPRUDENCE IN OTHER AREAS WHILE THE PETITIONER'S APPROACH IGNORES HISTORY AND UNDERMINES THE FUNDAMENTAL PURPOSES OF SOVEREIGNTY.

This Court has recognized that state-created entities exercising state power are entitled to immunity under analogous circumstances. In *Parker v. Brown*, 317 U.S. 341 (1943), the Supreme Court enunciated a similarly principled approach to the determination of a State's immunity from suit under federal antitrust laws. There, the Court held that the State is immune from liability where the state-created entity is engaged in activity undertaken pursuant to explicit state authorization. *Id.* at 350-51. Thus, under *Parker*, state-created entities, including political subdivisions and state agencies, enjoy immunity from federal antitrust actions where they have acted pursuant to an unequivocal mandate or authorization from the State. This principled approach is consistent with the Court's developing doctrine of residual sovereign immunity, and lends further support to an affirmance of the Eleventh Circuit here.[7]

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[7] The Court's jurisprudence under the Eleventh Amendment arm of the State doctrine is increasingly cognizant of the importance of state law, and the State's treatment of the entity. *See e.g. Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979) (acknowledging the importance of the States' treatment of the entity); *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274 (1979) (looking to the nature of the entity created under state law and the degree of funding and

Under the Petitioner's analysis, there is to be a singular approach to sovereign immunity where the federal courts, utilizing federal common law, apply the arm of the State test to determine issues of that sovereignty. ("[T]here is only one species of sovereign immunity which is embodied in the constitutional structure [.]" Petitioner's Brief, Summary of Argument). Thus, under the Petitioner's reasoning, if the federal court determines that the state entity is not an arm of the State, the analysis ends – even if the sovereign itself disagrees.

Petitioner's "singular" approach disregards the State's residuary and inviolable sovereignty and ignores the Court's methodology for determining the scope of state sovereign immunity. *Federal Maritime Commission* teaches that the Eleventh Amendment is but one exemplification of sovereign immunity and is not co-extensive with the state sovereignty that is embedded in our constitutional structure. The proper methodology to determine the scope of that immunity requires first an examination of the historic record to determine whether the Framers intended that this aspect of sovereignty be retained with the States. Next, the Court must examine whether the fundamental purposes of sovereign immunity, respect for the dignity of the State and protection of the state treasury, are furthered by a recognition of sovereign immunity under the circumstances. Petitioner disregards the Court's approach because it leads inevitably to

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guidance it received from the State). In fact, a review of the early case law on the doctrine indicates that the application of federal common law developed as an historic accident as the mechanism for analysis. *See Metropolitan Railroad Co. v. District of Columbia*, 132 U.S. 1 (1889) (the first case to consider the doctrine pertained to the District of Columbia where federal law applied to determining its status); *Lincoln County v. Luning*, 133 U.S. 529 (1890) (applying *Metropolitan Railroad* and denying immunity to a local county where the Nevada Constitution had explicitly provided for county liability to suit).

this result: that a state-created agency or instrumentality, exercising delegated state power and entitled to immunity under state law, must be accorded the dignity of sovereign immunity.[8]

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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[8] The main authorities relied on by Petitioner are not inconsistent with this conclusion. In *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), the agency was formed by a compact between the States of Nevada and California. Both States disclaimed any intent to confer immunity on the agency, and the compact expressly stated that the agency was not an arm of the State and that its obligations would not be binding on either State. Similarly, *Jinks v. Richland County*, 538 U.S. 456 (2003) concerned a local county jail, and the exercise of purely local power. *Mt. Healthy City Sch. Dist. Bd. of Ed. v. Doyle*, *supra*, concerned a local school board not treated as part of the "State" under state law.